IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs May 9, 2000

STATE OF TENNESSEE v. JERRY LANIER

Appeal from the Circuit Court for Dyer County
No. C99-207 Lee Moore, Judge

No. W1999-00905-CCA-R3-CD -Filed November 8, 2000

The Defendant entered a plea of nolo contendere to the charge of retaliation for past action, reserving a certified question of law pursuant to Tennessee Rule of Criminal Procedure 37(b)(2)(i). The trial court sentenced him to one year incarceration and ordered that the sentence run consecutively to previously imposed sentences. In this appeal, the Defendant presents his reserved certified question of law: whether Tennessee Code Annotated § 39-16-510, the statute under which he was convicted, is constitutional. We hold that the statute is constitutional and accordingly affirm the Defendant's conviction.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH, and JAMES CURWOOD WITT, JR., JJ. joined.

Steve McEwen, Mountain City, Tennessee and H. Tod Taylor, Assistant District Public Defender, Dyersburg, Tennessee, for the appellant, Jerry Lanier.

Paul G. Summers, Attorney General and Reporter, Kim R. Helper, Assistant Attorney General, C. Phillip Bivens, District Attorney General, James E. Lanier, Assistant District Attorney General, and Karen Waddell Burns, Assistant District Attorney, for the appellee, State of Tennessee.

OPINION

On June 14, 1999, the Dyer County Grand Jury indicted the Defendant, Jerry Lanier, on one count of possession of a controlled substance in a penal institution and on one count of retaliation for past action. On August 27, 1999, the Defendant entered a plea of nolo contendere to the charge

of retaliation for past action, and the trial court dismissed the charge of possession of a controlled substance in a penal institution. As part of his plea agreement, the Defendant reserved a certified question of law regarding the constitutionality of Tennessee Code Annotated § 39-16-510, the statute governing the offense of retaliation for past action. The trial court sentenced him as a Range I standard offender to one year in the Department of Correction and ordered that the sentence run consecutively to previously imposed sentences. The Defendant now appeals, presenting his reserved certified question of law for our review: whether Tennessee Code Annotated § 39-16-510 is constitutional.

Although the record in this case contains limited information concerning the factual basis for the Defendant's plea, it appears that the Defendant's current conviction for retaliation for past action stemmed from an incident which occurred on May 3, 1999.[1] On that day, the Defendant apparently appeared in the Dyer County General Sessions Court on unrelated charges, and the General Sessions judge set the Defendant's bond at $50,000. While being transported with another inmate to the Dyer County Jail after appearing in court, the Defendant told the deputy driving the patrol unit in which he was riding that the judge was "crazy" for setting a high bond. He also told the deputy that he was going to shoot the judge and asked the deputy to tell the judge that he planned to do so.

As a preliminary matter, we must first address the State's contention that the Defendant failed to properly reserve the certified question of law that he now presents for our consideration. The

[1] We have gleaned the facts in this case from the briefs of the parties, a Motion for Bill of Particulars filed by the Defendant, a Response to Motion for Bill of Particulars filed by the State, and from the transcript of the guilty plea proceeding.

State argues that the Defendant did not comply with the requirements for certification of a question of law which are set forth in Tennessee Rule of Criminal Procedure 37(b) and in State v. Preston, 759 S.W.2d 647 (Tenn. 1988). The State thus contends that this appeal should be dismissed.

Rule 37 of the Tennessee Rules of Criminal Procedure provides, in pertinent part, that

> [a]n appeal lies from any order or judgment in a criminal proceeding where the law provides for such appeal, and from any judgment of conviction . . . [u]pon a plea of nolo contendere if . . . Defendant entered into a plea agreement under Rule 11(e) but explicitly reserved with the consent of the state and of the court the right to appeal a certified question of law that is dispositive of the case . . . .

Tenn. R. Crim. P. 37(b)(2)(i).

In State v. Preston, 759 S.W.2d 647 (Tenn. 1988), the Tennessee Supreme Court defined "the prerequisites to the consideration of the merits of a question of law certified pursuant to Tenn.R.Crim.P. 37(b)(2)(i) or (iv)" as follows:

> Regardless of what has appeared in prior petitions, orders, colloquy in open court or otherwise, the final order or judgment from which the time begins to run to pursue a T.R.A.P. 3 appeal must contain a statement of the dispositive certified question of law reserved by the defendant for appellate review and the question of law must be stated so as to clearly identify the scope and the limits of the legal issue reserved. . . . Also, the order must state that the certified question was expressly reserved as part of the plea agreement, that the State and the trial judge consented to the reservation and that the State and the trial judge are of the opinion that the question is dispositive of the case. . . . No issue beyond the scope of the certified question will be considered.

Id. at 650; see also State v. Pendergrass, 937 S.W.2d 834, 836-37 (Tenn. 1996); State v. Irwin, 962 S.W.2d 477, 479 (Tenn. 1998). The burden of assuring that these prerequisites have been met is on the defendant. Id.

In this case, the judgment form, entered on August 27, 1999, contains the following statement: "Defendant preserves dispositive certified question of law for appeal as to constitutionality of retaliation for past action statute." No further information concerning the certified question of law is included on the judgment form. However, the record also contains an order, entered on September 14, 1999, which states:

> Comes the Defendant pursuant to Tennessee Rule of Appellate Procedure 37(b)(2)(i) and (iv) and with the consent of both the Court and State reserves the following certified dispositive question of law for appeal upon Defendant's No Contest Plea to the charge of Retaliation for Past Action:
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> Whether T.C.A. 39-16-510 is unconstitutionally vague or violative of the due process or free speech clauses of either the United States or Tennessee Constitutions.

Although the judgment form contains a statement concerning the certified question of law, the statement does not fully satisfy the requirements, as outlined by our supreme court, to properly reserve a certified question of law for appellate review. See Preston, 759 S.W.2d at 650. However, the State concedes, and we agree, that the subsequent order, entered on September 14, 1999, does contain sufficient information to satisfy the Preston requirements. It contains "a statement of the dispositive certified question of law reserved by the defendant for appellate review" identifying the scope and limits of the reserved issue. See id. It also states that the question was reserved as part of the Defendant's plea agreement. Moreover, it states that the State and trial court consented to the reservation and agreed that the question is dispositive.

Because the subsequent order was filed before filing of the notice of appeal, which occurred on September 15, 1999, we conclude that the order effectively cured any defects in the original

judgment concerning reservation of the certified question of law. The Tennessee Supreme Court has held that "an order entered by a trial court after the filing of the notice of appeal in the Court of Criminal Appeals is not effective to remedy noncompliance with Rule 37, Tenn. R. App. P., because the trial court no longer has jurisdiction." Irwin, 962 S.W.2d at 479 (emphasis added); see also Pendergrass, 937 S.W.2d at 837-38. Here, the trial court retained jurisdiction over this case at the time it filed the order dated September 14, 1999; the notice of appeal was not filed until the following day, September 15, 1999. In short, we conclude that the Defendant carried his burden of assuring that the Preston prerequisites were met, see Preston, 759 S.W.2d at 650, and that the certified question of law was properly reserved for appellate review.

Having concluded that this appeal is properly before us, we now proceed to consider the merits of the Defendant's appeal. The Defendant challenges the constitutionality of Tennessee Code Annotated § 39-16-510, the statute under which he was convicted. He argues that the statute violates the free speech clauses of the United States and Tennessee Constitutions. See U.S. Const. amend. I; Tenn. Const. art. I, § 19. Specifically, he contends that the statute is not narrowly drawn to advance the State's interest and that it is impermissibly overbroad.

Tennessee Code Annotated § 39-16-510 provides as follows:

> (a) A person commits the offense of retaliation for past action who harms or threatens to harm a witness at an official proceeding, judge, clerk, juror or former juror by any unlawful act in retaliation for anything the witness, judge, clerk, or juror did in an official capacity as witness, judge, clerk, or juror. The offense of retaliation for past action shall not apply to an employee of a clerk who harms or threatens to harm such clerk.
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> (b) A violation of this section is a Class E felony.

The First Amendment to the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." This provision is applicable to the states through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). Similarly, Article I, § 19 of the Tennessee Constitution provides that "[t]he free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for abuse of that liberty."

The Defendant first argues that the statute in question is not narrowly drawn and is not the least restrictive means to further the State's interest in protecting judges and others involved in the judicial process from harm.[2] Generally, the First Amendment prohibits governmental proscription of speech based upon disapproval of the ideas expressed through the speech. R.A.V. v. City of St. Paul, Minn. 505 U.S. 377, 382 (1992). Regulations based on the content of speech are presumptively invalid. Id. Such a regulation may be upheld only if the State can show that "the burden placed on free speech rights is justified by a compelling State interest," that the "least intrusive means" is used by the State to achieve its goals, and that the means chosen to achieve the goals "bear[s] a substantial relation to the interest being served by the statute in question." Bemis Pentecostal Church v. State, 731 S.W.2d 897, 903 (Tenn. 1987); see also State v. Smoky Mountain Secrets, Inc., 937 S.W.2d 905, 911 (Tenn. 1996).

However, the United States Supreme Court has emphasized that

[2] The Defendant concedes that the State's interest in enacting this legislation is compelling.

> the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words— those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (citations omitted). Threats of violence do not fall within the parameters of constitutionally protected speech because of the government's interest in "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." R.A.V., 505 U.S. at 388; see also Watts v. United States, 394 U.S. 705, 707-08 (1969). Furthermore, the government may regulate or completely ban speech proposing illegal activity. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496 (1982). However, statutes which regulate unprotected speech must be "carefully drawn or authoritatively construed to punish only unprotected speech and [must] not be susceptible of application to protected expression." Gooding v. Wilson, 405 U.S. 518, 522 (1972).

The Defendant also argues that the statute at issue is overbroad.[3] "'Overbreadth' is a judicially created doctrine designed to prevent the chilling of protected expression. The doctrine of

[3] The State contends that the Defendant's challenge of Tennessee Code Annotated § 39-16-510 on grounds of overbreadth does not fall within the scope of the reservation of the certified question of law. Although the Defendant did not specifically challenge the statute at issue as being overbroad in the order reserving his certified question of law, he did challenge the statute generally as "violative of the free speech clauses of the United States and Tennessee Constitutions." We will therefore address the Defendant's argument concerning overbreadth.

Furthermore, in the order reserving his certified question of law, the Defendant contended that the statute is also vague. However, he does not now raise this issue for our review.

overbreadth derives from the recognition that an unconstitutional restriction of expression may deter protected speech by parties not before the court and thereby escape judicial review." 16A Am. Jur. 2d *Constitutional Law* § 411 (1998). In other words, a statute is overbroad if it "inhibits the First Amendment rights of other parties." Village of Hoffman Estates, 455 U.S. at 495. The United States Supreme Court has "cautioned that the doctrine of overbreath is 'strong medicine' to be used 'sparingly and only as a last resort.'" State v. Lakatos, 900 S.W.2d 699, 701 (Tenn. Crim. App. 1994) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)). "[T]o succeed in a challenge based on overbreadth a defendant must demonstrate from the text of the law and actual fact that there are a substantial number of instances where the law cannot be applied constitutionally." State v. Lyons, 802 S.W.2d 590, 593 (Tenn. 1990); see also Village of Hoffman Estates, 455 U.S. at 494. Because the First Amendment prevents states from punishing "the use of words or language not within 'narrowly limited classes of speech,'" Gooding, 405 U.S. at 521-22 (quoting Chaplinsky, 315 U.S. at 571), a statute must be narrowly drawn so as "to punish only unprotected speech and not be susceptible of application to protected expression." Id. at 522.

Applying these principles to the case at hand, Tennessee Code Annotated § 39-16-510 seeks to prohibit threats of violence against specific individuals involved in the judicial process. As previously stated, threats of violence are not a form of protected speech. See R.A.V., 505 U.S. at 388; Watts, 394 U.S. at 707-08. We believe that the speech proscribed by Tennessee Code Annotated § 39-16-510, namely "threaten[ing] to harm . . . [a] witness, judge, clerk, or juror," enjoys no First Amendment protection. Nor does the statute at issue implicate any other constitutionally protected right. The statute is narrowly drawn to punish only unprotected speech; it prohibits only

threats of violence. Moreover, the Defendant has not shown that "there are a substantial number of instances where the law cannot be applied constitutionally." Lyons, 802 S.W.2d at 593.

The Defendant suggests, however, that the statute is overbroad because it "does not require a likelihood that the threats to harm will produce the unlawful activity." He argues that because he was restrained in the back of a patrol car at the time he made the threat, there was no likelihood that he would actually shoot the judge. Federal courts have concluded that "[t]he prosecution need not prove that the defendant had the ability or actually intended to carry out [a] threat." Melugin v. Hames, 38 F.3d 1478, 1485 (9th Cir. 1994) (citing United States v. Khorrami, 895 F.2d 1186, 1192-93 (7th Cir. 1990)). Likewise, we believe that there is no necessity for the State to prove that threats of harm made in contravention of Tennessee Code Annotated § 39-16-510 are likely to produce unlawful activity.

We conclude that Tennessee Code Annotated § 39-16-510 does not infringe on the privilege of free speech and that it is therefore constitutional. Accordingly, we AFFIRM the judgment of the trial court.

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ROBERT W. WEDEMEYER, JUDGE